United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7188

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P/S

United States Court of Appeals

For the Second Circuit

Docket No. 77-7188

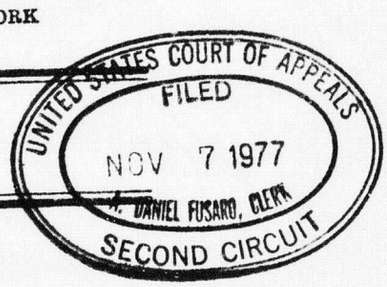
REGAL HEALTH SPA, INC.,
Plaintiff-Appellant,

—against—

JEREMIAH T. WALSH, as Commissioner of the City of New York Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and HONORABLE HUGH CAREY, as Governor of the State of New York,
Defendants,

JEREMIAH T. WALSH,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
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REGAL HEALTH SPA, INC.,

Plaintiff-Appellant,

- against -

JEREMIAH T. WALSH, as Commissioner of the City of New York Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and HONORABLE HUGH CAREY, asGovernor of the State of New York,

Defendants,

JEREMIAH T. WALSH,

Defendant-Appellee.

- -X

Docket No. 77-7188

Statement

The District Court order declining jurisdiction under the principles set forth in Younger v. Harris, 401 U.S. 32 (1971) was based upon the pendency of a criminal court complaint

> "wherein the plaintiff has the opportunity to litigate its constitutional claims, that the plaintiff has by virtue of that pending state criminal action an adequate remedy at law and that the plaintiff has failed to allege or show any special circumstances to warrant federal interference therein by means of injunctive or declaratory relief ...." (A 59-60) (Underscoring added).

Point I

There is no state criminal action pending against appellant Regal Health Spa, Inc.

The information made by Edward Tricomi, sworn to April 1, 1977 against "Sari M. Rucker (MGR.-P.I.C.) .... Manager - P.I.C. of the premises known as 133 West 45th Street in the County of New York" (underscoring added) charged her with violation "Section 643a-8.0 and of Section C26-87.0 of the Administrative Code in that said defendant did knowingly fail and neglect to comply with the lawful order and requirement of the Commissioner of Buildings and the Borough Superintendent for the Borough of Manhattan, City of New York affecting said premises..." (Underscoring added). The information did not charge the defendant Sari M. Rucker with a violation of the New York City Zoning Resolution. The information alleged conclusorily that the "order and requirement of the Commissioner of Buildings and Borough Superintendent ... (were) predicated upon Section 32-18 and 81-021 Zoning Resolution." The said information further alleges that the "said lawful order was ... served upon said defendant on the 9th day of March, 1977 whereby said defendant was directed to: Discontinue all non-conforming uses forthwith and that this order has not been complied with ...." (Underscoring added).

It should be noted that Regal Health Spa, Inc. is not

the defendant in that criminal court information. The named defendant is Sari M. Rucker. The information does not allege that she is an officer, director, or stockholder of Regal Health Spa, Inc. The defendant Sari M. Rucker is not alleged to be connected to Regal Health Spa, Inc. either as an employee, or as a manager, or even as "person-in-charge" (whatever that may mean as a description of a legal relationship). The defendant Sari M. Rucker is described, conclusorily, as "being the manager-P.I.C. of the premises known as 133 West 45th Street ...." See CPLR Section 311, Clark v. Fifty Seventh Madison Corp., 13 A.D. 2d 693, 213 N.Y.S. 2d 849, rearg. denied 13 A.D. 2d 827, 217 N.Y.S. 2d 566, app. dismissed, 10 N.Y. 2d 808 (1961); State v. Cortelle Corp., 73 Misc. 2d 352, 341 N.Y.S. 2d 640, affirmed 43 A.D. 2d 668, 349 N.Y.S. 2d 653, modified on other grounds, 38 N.Y. 2d 83, 378 N.Y.S. 2d 654 (1972). The information did not allege that Regal Health Spa, Inc. occupied any part of those "premises".

Regal Health Spa, Inc. is not a defendant in the pending criminal court information by Edward Tricomi against Sari M. Rucker, defendant. People v. Komar, 10 A.D. 2d 667, 196 N.Y.S. 2d 882 (1st Dept. 1960); N.Y.C.P.L. Section 100.10(1); People v. Hamm, 9 N.Y. 2d 5, 11 (1961). The New York Court of Appeals in People v. Hamm, supra, held that the failure to state in an information the name of the person charged as defendant is a jurisdictional defect. People v. Knapp, 152

Misc. 368, 274 N.Y.S. 85, 87, 88, affirmed 242 App. Div. 811, 275 N.Y.S. 637 (1st Dept. 1934); The Court of Appeals in People v. Hamm, 9 N.Y. 2d 5, 11 (1961) quoting People v. Zambounis, 251 N.Y. 94, 97, held that "'Forms and procedure still have their place and purpose in the administration of the law; without them, we would have chaos' ...."

Point II

The appellant could not litigate in the State Criminal Court, its Constitutional claims presented to the federal court.

Even if Regal Health Spa, Inc. had been named as a defendant in the criminal court information which charged defendant Sari M. Rucker with a violation of an "order and requirement of Commissioner of Buildings..." the issue of the constitutionality of the Zoning Resolution could not be raised as a defense or otherwise in that criminal court action. People v. Namro Holding Corp., 8 N.Y. 2d 1131 (1960); People v. Gillman, 6 A.D. 2d 899 (2d Dept. 1958); People v. Ludwig, 262 App. Div. 912 (2d Dept. 1941); People v. Gutterman, 36 Misc. 2d 795, 233 N.Y.S. 2d 417 (Cr. Ct., Queens 1962); People v. 70 Realty Corporation, 70 N.Y.S. 2d 265, 268, 270 (Mag. Ct., Manhattan 1948); see, New York City Charter, Section 666(6).

Conclusions

The principles set forth in Younger v. Harris, et al. are not applicable.

Respectfully submitted,

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